pleadings. The particulars they sought to amend, *inter alia,* were for the sum of $33,362.89 to read $34,408.89, damages for breach of contract and/or the tort of conversion, and fraud. As the plaintiffs have pleaded fraud for the first time, they must as a matter of necessity apply for a conversion of the specially indorsed writ to a general writ. In this connection I need only refer to the relevant portion of O. 3 r. 6 of the Rules of the Supreme Court, 1957, which reads:—

"6. (1) In any action other than one which includes:
(a) . . . .
(b) a claim by the plaintiff based on an allegation of fraud,
the writ of summons may, at the option of the plaintiff, be specially indorsed with or accompanied by a statement of his claim".

Now, as a general rule either party is allowed to make any such amendment as is reasonably necessary for the due presentation of his case, on payment of the costs of and occasioned by the amendment, provided there has been no undue delay on his part, and provided also that the amendment will not injure or affect any vested rights of his opponent. Where the amendment is necessary to enable justice to be done between the parties, it will be allowed on terms even at a late stage. If the application be made *mala fide,* or if the proposed amendment will cause undue delay, or will in any other way unfairly prejudice the other party, or is irrelevant or useless, or merely raise a technical point, leave to amend will be rejected. There are numerous decided cases on the point but I need only quote the local case of *Looi Guan Kway* v. *Low Lean Bok* [1] where, upon an application by the plaintiff to amend the plaint, Aitken J., after a study of the relevant authorities enunciated three subsidiary principles for the guidance of the court:—

1. There is *bona fides* on the part of the applicant;
2. They cause no prejudice to the other side which cannot be compensated by costs; and
3. They are not such as to turn a suit of one character into a suit of another and inconsistent character.

Apart from what would appear to be some mathematical miscalculation as to the sum owing by the defendant which was discovered by the plaintiffs subsequent to the filing of the writ, I am not unmindful of the fact that the plaintiffs are seeking to introduce a new cause of action in tort in addition to their original cause of action. I am satisfied that the new cause of action does not turn a suit of one character into a suit of another and inconsistent character. It merely adds a new cause of action which concerns the same parties and which involves substantially the same facts and arises, as it seems to me, out of the same transaction *inter partes.* As was stated by Cotton L.J. in the case of *Kurtz* v. *Spence*:— [2]

"When by an amendment the real substanstial question can be raised between the parties, ought we to refuse to allow the amendment, having regard to the rule, and to the direction in the Judicature Act that as far as possible in any proceeding all questions between the parties shall be decided so as to prevent a multiplicity of actions?"

I can see no prejudice caused to the defendant if the application is allowed, as he will in turn be given leave to amend his defence if he so chooses: nor can I find any *mala fides* on the part of the plaintiffs in wanting to amend their pleadings at this stage.

The only substantial question to be answered is an extremely technical one and it has never yet come for decision before our courts; whether there can be a conversion from a specially indorsed writ to a generally indorsed writ. However, there is authority for the conversion from a general to a specially indorsed writ, and this is found in the case of *Paxton* v. *Baird.* [3] I can see no reason why the converse should not apply. If I allow the plaintiffs the amendment to the statement of claim, it follows, in my view, under O. 3 r. 6 that I must allow them the conversion of the writ with the necessary indorsement. I hereby allow conversion of the writ which has to be duly indorsed. The statement of claim originally indorsed in the writ and the amendment asked for will be treated as the statement of claim in the present case. The plaintiffs are to serve the amended writ on the defendant and there will be liberty to the defendant to amend his defence within 21 days from the date of service. Costs to the defendant in any event as occasioned by this amendment.

Application allowed.

Solicitors: *Shearn, Delamore & Co.; Mah & Kok.*

WONG SEE HAR v. PUBLIC PROSECUTOR

[A.Cr.J. (Azmi C.J. (Malaya)) August 14, 1967]
[K.L. — Criminal Appeal No. 60 of 1967]

Penal Code, s. 348 — Extortion — Evidence that accused is member of secret society — When admissible in charge of extortion — Prosecution not bound to produce all available eye witnesses — Evidence Ordinance, 1950, ss. 54 and 114.

The appellant who was convicted of extortion appealed on two grounds: (a) admission of evidence that he was a member of a secret society previously prejudiced his trial; (b) failure of the prosecution to produce a possible eye witness raised a presumption unfavourable to the prosecution under section 114 of the Evidence Ordinance.

Held: (1) it was part of the threat that the appellant was a member of a secret society and therefore, in

a case of extortion it became a relevant fact under section 54 of the Evidence Ordinance;

(2) it was not clear from the evidence in this case whether the witness who was not produced was able to give evidence in regard to the conversation which took place at the material time. The prosecution was not bound to call all available eye witnesses. They have a discretion, which in this case was rightly exercised.

Cases referred to:—

(1) *P.M. Peter Singho* v. *M.B. Werapitiya*, 55 New Law Reports 155.

(2) *Stirland* v. *Director of Public Prosecutions* [1944] A.C. 315.

(3) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105, C.A.

(4) *Seneviratne* v. *R.* [1936] 3 All E.R. 36.

CRIMINAL APPEAL.

Dato' S. P. Seenivasagam (*Wong Mun Yong* with him) for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Azmi C.J. (Malaya): The appellant was convicted of extortion by putting one Ng Choo Kiat in fear of injury.

According to Ng Choo Kiat, the appellant came to his house and called out his name from the outer gate. When the complainant went to him the appellant told him to the effect that a few of his brothers of his organization had a fight with others and had been arrested by the authorities, and that he needed money to engage a counsel. The appellant also said to him "If you do not give me money you will in future lose $10,000 or $20,000." Then Ng Choo Kiat went on to say in his evidence "When the conversation started I knew that he was from one of these secret societies. I was then in fear and I knew it was a threat."

The learned magistrate in his ground of judgment in reference to this evidence stated as follows:—

"From the time the accused started the conversation P.W.1 knew that accused was a member of a secret society and towards the end accused became aggressive."

The main ground of appeal is against the admission of the evidence that the appellant was a member of a secret society and the reference by the magistrate in his ground of judgment. It was urged that by reason of the admission of this evidence the appellant was seriously prejudiced at the trial as it seriously influenced the appellant's credibility.

In support of this contention learned counsel for the appellant referred me to a Ceylon case *P. M. Peter Singho* v. *M. B. Werapitiya.*[1] In that case the accused was charged with cheating and he put his good character in issue. The learned magistrate admitted evidence to the effect that there was pending against the accused at that time a criminal case in which he was charged with forgery. The matter was appealed to the High Court and the learned judge held that that evidence was irrelevant and in support cited the judgment of Lord Simon in *Stirland* v. *Director of Public Prosecutions* [2] which reads as follows:—

"It is no disproof of good character that a man has been suspected or accused of a previous crime. Such questions as 'Were you suspected?' or: 'Were you accused?' are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has sworn expressly to the contrary:"

With respect I would say that that case can be distinguished from the present case before me. In the present case the accused was charged with extortion. In this case it was apparent that the complainant thought that the appellant must be a member of a secret society, from the fact that the appellant told him that he, the appellant, had come for money for the purpose of defending his brothers who had been arrested for fighting with others. His evidence therefore is evidence which is relevant to a fact in issue and as such therefore becomes relevant under section 54 of the Evidence Ordinance, 1950. Section 54 reads as follows:—

"54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1. — This section does not apply to cases in which the bad character of any person is itself a fact in issue."

It was part of the threat that the appellant was a member of a secret society and therefore in a case of extortion it becomes a relevant fact.

In my view, therefore, this ground must fail.

The next ground of appeal was against the failure of the prosecution to produce the wife of the complainant as a witness for the prosecution. It was urged that by reason of this failure a presumption under section 114 of the Evidence Ordinance would arise. Paragraph (g) to the section reads as follows:—

"114. The court may presume . . . .

(g) that if it could be and is not produced would if produced be unfavourable to the person who withholds it."

Before considering this ground it is necessary in my view to refer to the facts of the case in reference to this woman.

According to Ng Choo Kiat, while he was talking with the appellant two of his neighbours came to the house and when he saw them he asked his wife to open the gate at which he was talking to the appellant. Subsequently he said "My wife stood outside the house inside the gate about ten feet from the gate." It is not therefore very clear from the evidence whether the woman was sufficiently near to hear the conversation between the appellant and the complainant. The defence did not deny that appellant came to the gate and spoke to the complainant.

In reference to this ground, however, the learned deputy public prosecutor submitted that the law is now settled that the prosecution is not bound to produce all available eye witnesses, and though he has not cited any authority to me he undoubtedly had in mind the judgment of the then Court of Appeal in the case of *Khoon Chye Hin* v. *Public Prosecutor*.[3] At page 109 the following passage appears:—

"It is, of course, well settled that in a criminal case prosecuting counsel, provided there is no wrong motive, has a discretion as to whether or not to call any particular witness and in particulalr has a discretion not to call in support of his case a witness whom he does not believe to be a witness of truth."

Further down the column the following passage from the judgment of Lord Roche in the case of *Seneviratne* v. *R.*[4] at page 48 was cited:—

"Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination."

The above judgment of the Judicial Committee of the Privy Council has been regarded as having finally settled this matter to the effect that although witnesses essential to the unfolding of the narrative on which the prosecution is based, must of course, be called by the prosecution whether the effect of their testimony is for or against the prosecution case, still speaking generally the prosecution is not bound to call all available eye witnesses irrespective of consideration of number and of reliability.

In my view having regard to the facts of this case, the prosecution had rightly exercised its discretion in not calling the wife of the complainant to give evidence.

I would therefore dismiss the appeal and confirm both conviction and sentence.

Appeal dismissed.

SAN SOO HA v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) September 2, 1967]
[K.L. — Criminal Appeal No. 62 of 1967]

Penal Code, s. 454 — House breaking and theft — Possession of stolen goods nine weeks after commission of theft.

Penal Code, s. 411 — Retaining stolen property.

Criminal Law and Procedure — Search — Search list to be made — Irrelularity in search and failure to make a list of things seized in the course of search — Criminal Procedure Code (Cap. 6), s. 64.

Evidence — Statement of accused "the stolen money was kept in my room" — Whether admissible — Presumption — Evidence Ordinance, 1950, s. 27.

On the morning of July 7, 1965 a house was broken into and cash in currency notes, coins, a wrist watch and two plastic bags were stolen. On September 13, 1965 the appellant was arrested. He gave a statement to the police officer to the effect that "the stolen money was kept in his room". As a result of such information the appellant led a police party to his flat. There they recovered some cash wrapped and marked in paper wrapping with writing on each roll and also the bags which the complainant identified.

As a result the appellant was charged with housebreaking and theft of the property to a total value of $5,270 under section 454 of the Penal Code, alternatively with dishonestly retaining stolen property, to wit, cash $1,464.20 under section 411 of the Penal Code. He was convicted and sentenced to three years' imprisonment. He appealed.

It was argued on appeal that the statement of the appellant to the police leading to discovery i.e. "the stolen money was kept in my room" was prejudicial and that a search list as required by section 64 of the Criminal Procedure Code was not prepared by the officer who conducted the search.

Held: (1) the statement of the appellant, "the stolen money was kept in my room" could not be taken as a confession of guilt and, therefore, unobjectionable and admissible under section 27 of the Evidence Ordinance;

(2) the failure to comply with the provisions relating to search list may cast doubt upon the *bona fides* of the parties conducting the search and accordingly affords ground for scrutiny; but if after close scrutiny the court arrives at the conclusion that the stolen articles were recovered from the possession of the accused person, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law which makes such evidence inadmissible.

Cases referred to:—

(1) *Wang Kia Heng* v. *Public Prosecutor* [1951] M.L.J. 109.

(2) *Rama* v. *State* A.I.R. 1952 Bom. 299.

(3) *Hashim & Anor.* v. *Public Prosecutor* [1956] M.L.J. 233.

(4) *Vidya Prakash* v. *State* A.I.R. 1954 Pepsu 72.

(5) *Mamun* v. *Emperor* A.I.R. 1930 Lah. 530.

(6) *Bashir* v. *Emperor* A.I.R. 1932 All. 185.

(7) *Bhattacharjee* v. *Emperor* A.I.R. 1940 Cal. 85.

CRIMINAL APPEAL.

V. Oorjitham for the appellant.

Zaiton binte Osman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an appeal against conviction and sentence.

The appellant was charged with housebreaking and theft of property to a total value of $5,270 under section 454 of the Penal Code, alternatively with dishonestly retaining stolen